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NO. 87-850

In the Supreme Court of the United States

October Term, 1987

HART SCHAFFNER & MARX and HART SCHAFFNER & MARX SUBSIDIARY AND AFFILIATED COMPANIES GROUP LIFE INSURANCE AND MEDICAL PLAN,
Petitioners

v.

BARBARA AND CHRISTOPHER SCHULTZ individually and on behalf of their minor daughter, RACHAEL SCHULTZ,
Respondents.

On Writ of Certiorari To
The United States Court of
Appeals for the Fifth Circuit

OPPOSITION TO PETITION FOR A WRIT OF CERTIORARI

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STATEMENT OF THE CASE

This matter arises out of $170,000 of medical expenses incurred by Respondents, the Schultz family, as a result of injuries they sustained in a Pan American World Airways jetliner crash on July 9, 1982. At the time of the crash the Schultz family were participants or beneficiaries under the Hart Schaffner and Marx Subsidiary and Affiliated Companies Group Life Insurance and Medical Plan ("the Plan"). This plan was administered by Hart Schaffner and Marx ("HSM"), the parent company of Porter Stevens, the employer of Christopher Schultz. Both the Plan and HSM are Petitioners herein.

The request for payment of these expenses was diverted from the normal claims handling procedure (which included routing to the administrative services provider, Metropolitan Life Insurance) and handled by the Legal Department of the

administrator, HSM. After receiving all information regarding the medical expenses, including the fact that Pan Am would pay for these same medical expenses in its position as a third party tortfeasor, under its liability obligations, the Plan denied the claim. The Plan, acting through its general counsel, Carey Stein, twice deceived Respondents into thinking that their claim was being processed by the administrative services provider when it was not. The ground for the denial, that a third party tortfeasor would pay these same medical expenses, is not based on the terms of the Plan. There is no subrogation clause, nor is there any exclusion for amounts which may be collected from a third party tortfeasor. The Plan simply felt it was not fair to allow coverage for these amounts.

After Respondents filed suit to recover these expenses HSM and the Plan sought dismissal on the grounds that Respondents failed to exhaust their administrative remedies under the Employee Retirement Income Security Act ("ERISA"). The District Court rejected Respondents' position that an appeal would have been futile and dismissed the case, without prejudice, on the grounds that Respondents had failed to exhaust administrative remedies by appealing the Plan's denial. Respondents had claimed that an appeal would have been futile because 1) an appeal would have been to the same exact persons who had (a) diverted the claim from the normal claim procedure, and (b) deceived the claimants that their claim had been turned over to the administrative services provider, when it had not and 2) there was simply no basis under the language of the Plan for the denial, and

thus to ask the chief counsel for HSM to review his own "groundless" interpretation of the Plan used to deny the claim would have been futile.

Respondents asserted two basic arguments on appeal; 1) that any further review would have been futile; and 2) the dismissal without prejudice could effectively bar any future judicial review because prescription would have run. (Respondents cited the appellate court to jurisprudence supporting the fact that the filing of a lawsuit which is subsequently dismissed without prejudice does not interrupt the prescriptive period. Because the prescriptive period in this matter would have run by the time another lawsuit could be filed it would have effectively barred any court from judicially reviewing this matter once the administrative appeal had been completed.)

While this appeal was pending Respondents sought an administrative review through the Plan, which was concluded in May, 1987, wherein the Plan, as expected, again denied the claim. Prior to the Plan denying this claim, but after the administrative review was sought, Petitioners asked the Appellate Court to dismiss the appeal on the grounds that it had become moot because Respondents had sought the administrative appeal. (Appendix A.)

Prior to oral argument the Court of Appeals for the Fifth Circuit provided counsel with four questions which were to be addressed either orally or in writing in advance of oral argument. (Appendix B) A review of these questions indicates that the panel was very concerned over the second major issue raised by Respondents in their appeal; that is whether the dismissal by the District Court, without

prejudice, would act as a bar to any judicial review of the Schultz claim once administrative prerequisites had been met.

This became evident during oral argument when the only issue addressed by the panel was whether it would be appropriate to completely bar judicial review on the grounds that the procedural prerequisites to filing a lawsuit had not been followed. During oral argument counsel for Petitioners candidly admitted that he knew of nothing in the Plan which would prohibit the Plan from delaying administrative review until after the prescriptive period for filing a lawsuit had expired.

Based on this background the Court of Appeal vacated the dismissal without prejudice and remanded this matter back to the District Court so that judicial review of the claim denial could be heard.

(Appendix A of Petition for Writ of Certiorari)

SUMMARY OF ARGUMENT

The Court should not grant this Writ of Certiorari because Petitioners have cited no classification under Rule 17 of this Court's rules in which this matter falls. Although the appellate briefs addressed many ERISA issues, the decision rendered by the Court of Appeals for the Fifth Circuit is purely a procedural decision which did not address any of the ERISA issues. Instead, the decision and denial of rehearing specifically stated that all issues raised on appeal were preserved for argument upon remand to the District Court. Neither of the two decisions rendered by the District Court, nor the decision of the Court of Appeals were deemed significant enough to even publish in the reporter system. Cases which are not even significant enough to

publish in the reporter systems certainly cannot be significant enough to be reviewed by this Honorable Court.

ARGUMENT

It is respectfully suggested that this Honorable Court should deny the Petition for Writ of Certiorari because:

a) The Court of Appeals decision is purely a procedural one which does not address ERISA issues at all; and

b) The decisions of the District Court and Court of Appeals were not even deemed to be significant enough to publish.

Instead, this petition is a "last ditch" effort on the part of Petitioners to obtain a substantive remedy (complete denial of the claim) from a procedural defect, something which the Court of Appeals refused to do. Petitioners hope by obtaining this Writ of Certiorari that they can prevent Respondents from ever having

a court of law review this claim denial, thus denying them their day in court and procedural due process.

a) Only a procedural case

Petitioners have asserted that the decision of the Fifth Circuit Court of Appeals will have an impact on ERISA. As one can see from the decision, it was purely a procedural decision to vacate the dismissal without prejudice so that Respondents would have an opportunity to present all issues before the District Court. The decision did not address the ERISA issues before the Appellate Court. In fact, in the denial of the Petition for Rehearing the Appellate Court stated:

> Indeed, the opinion clearly holds that all issues in the appeal are preserved for resolution in one case before the District Court and, if necessary, in one appeal.

(Appendix B at A-6 of Petition for Writ of Certiorari.)

The justification for vacating the District Court's dismissal was the possibility that the dismissal without prejudice may have barred Respondents from ever seeking a judicial review of the claim denial. There was some case authority that the filing of a complaint in a case which is subsequently involuntarily dismissed would not toll the prescriptive period. Pond v. Braniff Airways, Inc., 453 F. 2d 347 (5th Cir. 1972); Stein v. Reynolds, 667 F. 2d 33 (11th Cir. 1982). Since the prescriptive period for filing a lawsuit by Respondents against Petitioners would already have run when it was dismissed, Respondents would have been forever prevented

from seeking a judicial review of the Plan's denial.

It is settled that procedural defects do not necessarily require substantive remedies. A substantive remedy would be appropriate only if the procedural defects caused a substantive violation or themselves worked a substantive harm. Ellenburg v. Brockway, Inc., 763 F. 2d 1091, 1096 (9th Cir. 1985); Wolfe v. J.C. Penney Co., Inc., 710 F. 2d 388 (7th Cir. 1983). By dismissing Respondents' action without prejudice, thus preventing a judicial review of the Plan's actions, the Plan would have obtained a substantive remedy (no responsibility for $170,000 of medical expenses) as a result of a procedural defect (failure to appeal the claim denial).

As the court in Grossmuller v.International Union, UAW, 511 F. Supp. 709, 710 (E.D. Pa. 1981) noted: "cases are sparse on this issue, but as a matter of common sense, a [party] is not entitled to a substantive remedy merely because of a procedural violation."

What a court should do, as the Court of Appeals did in this case, is to fashion some remedy to correct the procedural deficit if necessary. In the Grossmuller case cited above, to correct a failure to give notice the court ordered appropriate notice be given and a hearing be set. 511 F. Supp. at 710. Likewise, in Challenger v. Local Union No. 1, 619 F. 2d 645 (7th Cir. 1980) due to the failure of the Plan to mention arbitration and advise of steps necessary to proceed along those

lines, the court extended the employee's time for requesting arbitration. The Court of Appeals agreed in the case at bar that a substantive remedy was not warranted and thus vacated the dismissal. This action is allowed under ERISA, 29 USC Sec. 1132 (a)(3)(B) allowing the award of "other appropriate equitable relief".

This Petition for Certiorari is Petitioners' final effort to escape responsibility for this claim because of an alleged procedural defect, which the Appellate Court did not even affirm as to being a procedural defect. The Appellate Court held that the Schultz family should be allowed to have a court review the Plan's decision. Petitioners hope that this Honorable Court will take that right away from Respondents.

This must not be done.

b. Lack of precedential value of the District and Appellate Court Decisions

Neither the minute entry of the United States District Court for the Eastern District of Louisiana dismissing Respondents' complaint, nor that court's minute entry denying Respondents' Motion for New Trial were reported. Furthermore, the opinion of the United States Court of Appeals for the Fifth Circuit was not reported in accordance with Local Rule 47.5. According to that Local Rule, the Fifth Circuit essentially felt that this decision had no precedential value and was merely decided on the basis of well settled principals of law and that publication of the decision would impose needless expense on the public and burden the legal profession. (See

page A-2 of Petition for a Writ of Certiorari)

Since none of the lower courts even deemed their decisions worthy of publication, then Respondents respectfully suggest that this Honorable Court should not feel that it should be worthy of further review in light of the many other categories of cases falling squarely within Rule 17 which do in fact have precedential value. Therefore for this reason also, the Writ of Certoriari should be denied.

CONCLUSION

Contrary to the argument raised by Petitioners, this case does not involve ERISA. The Appellate Court did not address any of the ERISA issues raised there. Instead, the Appellate Court felt that the ERISA issues had been "mooted" by the

subsequent review of the claim by the Plan. (something Petitioners themselves argued in their Motion to Dismiss the Appeal.) However, the Appellate Court correctly recognized that there was a danger that Petitioners would obtain a substantive remedy "absolution from liability for the $170,000 claim" because of a procedural defect "lack of an administrative review" as a result of the District Court's dismissal without prejudice. To avoid this danger, and to assure Respondents' right to a judicial review of the Plan's claim denial, the Fifth Circuit vacated the District Court's dismissal without prejudice and remanded the matter to the District Court. Any review by this Court would simply be reviewing a procedural decision, something

which falls nowhere within Rule 17. Furthermore, it is hard to conceive that a decision which none of the lower courts deemed significant enough to publish and one which the Fifth Circuit felt had no precedential value can be of such a magnitute as to fall within Rule 17 of this Honorable Court's rules. Thus, Respondents respectfully suggest that this Petition for Writ of Certoriari should be denied.

Respectfully submitted,

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APPENDIX A

IN THE UNITED STATES COURT OF APPEALS

FOR THE FIFTH CIRCUIT

NO. 86-3870

BARBARA AND CHRISTOPHER SCHULTZ, individually and on behalf of their minor daughter, RACHAEL SCHULTZ
Plaintiffs-Appellants.

v.

METROPOLITAN LIFE INSURANCE COMPANY, HART SCHAFFNER & MARX and HART SCHAFFNER & MARX SUBSIDIARY AND AFFILIATED COMPANIES GROUP LIFE INSURANCE and MEDICAL PLAN
Defendants-Appellees.

Appeal from the United States District Court for the Eastern District of Louisiana

MOTION OF DEFENDANTS-APPELLEES TO DISMISS APPEAL ON THE GROUNDS OF MOOTNESS

Now come Hart Schaffner & Marx ("HSM") and Hart Schaffner & Marx Subsidiary and Affiliated Companies

Group Life Insurance and Medical Plan ("the Plan"), by their undersigned counsel, and, moving this Honorable Court to dismiss the instant Appeal of the Plaintiffs-Appellants ("Plaintiffs") on the ground of mootness, and in support thereof, move and state as follows:

1. Occurrences after the entry of the District Court's orders appealed from has rendered Plaintiff's Appeal moot. On August 12, 1986, the District Court dismissed Plaintiffs' Complaint (without prejudice) by reason of Plaintiffs' failure to exhaust administrative remedies as required in connection with a self-insured benefits plan governed by the Employee Retirement Income Security Act, 29 U.S.C. Sec. 1001 et. seq. ("ERISA") (R. 1233-34).

2. Plaintiffs sought to overturn such dismissal by post-judgment motion which acknowledged their failure to seek the requisite administrative review, but asserted they were justifiably unable to obtain such review and that they should be excused from the exhaustion requirement; it was claimed that adminitrative review would have been "futile" (R. 1251).

3. On November 12, 1986, the District Court denied such motion of Plaintiffs, again holding that exhaustion of administrative remedies was required. The Court once again considered, and rejected, Plaintiffs' allegations of futility (R. 1289-90).

4. Plaintiffs filed their Notice of Appeal on December 8, 1986, (R. 1294) and their Original Brief on February 12, 1987. Plaintiffs urge

this Honorable Court to reverse the District Court's two decisions, since the requirement that Plaintiffs exhaust their administrative remedies should be excused, it is asserted, because (a) Plaintiffs did not or could not obtain such review because of their lack of notice of such rights; and (b) such review is, and was at all material times, futile.

5. Following the entry of said District Court order, Plaintiffs requested - and were granted - administrative review of the subject claim by the Hartmarx Group Medical Plan Claims Appeal Committee ("Benefits Appeal Committee"). Such review is ongoing and is currently proceeding at Plaintiffs' special instance and request. More specifically:

(a) On December 4, 1986, after the entry of the District Court orders but before appeal therefrom was taken, Plaintiffs' counsel requested "an appeal of the Plan's denial of their claim for medical benefits under the Plan . . . This appeal is being taken in accordance with the rules of your Plan and ERISA" (December 4, 1986 letter of Edward F. Downing, III, attached hereto as Exhibit A).

(b) On January 16, 1987 (after other, preliminary correspondence was forwarded to Plaintiffs' counsel), the Benefits Appeal Committee granted such request, advising Plaintiffs' counsel as to the purpose, procedures and time schedules respecting such administrative review (January 16, 1987 letter of Sherman D. Rosen, Benefits Appeal Committee

Chairperson, attached hereto as Exhibit B).

(c) Plaintiffs' counsel has thereafter forwarded to the Benefits Appeal Committee all of the materials, written statements and arguments applicable to such administrative review; said Committee has met on a number of occasions to review the merits of Plaintiffs' administrative appeal; Plaintiffs have submitted other and further documentation in support thereof, which have been and will be considered by said Committee; and most recently, Plaintiffs have accepted the Committee's invitation for an oral telephonic hearing in connection therewith, and all pursuant to the correspondence of Plaintiffs' counsel and of said Committee and the Affidavit attached

hereto as Group Exhibit C and Exhibit D, respectively.

6. Plaintiffs' request for administrative review following the entry of the District Court Orders, and the granting of such review, thus has provided Plaintiffs with the very relief they claimed they could not obtain, and from which they sought to be excused. The issues raised by the instant appeal are no longer alive. Plaintiffs prosecute the instant appeal - squarely based upon the supposed unavailability and futility of administrative review - even as they enjoy the rights and privileges of the same administrative review process. Plaintiffs' post-judgment initiation of their administrative appeal process accordingly has rendered the instant judicial appeal moot.

7. Moreover, Plaintiffs' principal argument for the supposed futility of any administrative review process is the claim that the reviewers would have been the same persons who denied the claim in the first instance. Such theory is not warranted under existing law and has been repeatedly disapproved. See, for example Denton v. First National Bank of Waco, Tex. 765 F.2d 1295 (5th Cir. 1985). Even so, the very premise of the argument is simply false. After Plaintiffs requested administrative review on December 4, 1986 (but before they filed the instant judicial Appeal), the Benefits Appeal Committee designated to so investigate, examine and review were and are five persons, none of whom are alleged by Plaintiffs to have denied any part of the

underlying claim (See, Affidavit of Sherman D. Rosen, Benefits Appeal Committee Chairperson, attached hereto as Exhibit D).

By reason of events initiated by Plaintiffs and occurring after the entry of the lower court orders, the issues raised by Plaintiffs' Appeal accordingly are moot.

In further support hereof, Defendants-Appellees respectfully submit their Memorandum of Law attached hereto.

WHEREFORE, Defendants-Appellees respectfully move this Honorable Court to strike and dismiss Plaintiffs Appeal with costs and fees taxed to Plaintiffs.

Respectfully submitted,

_____

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APPENDIX B

UNITED STATES COURT OF APPEALS

Fifth Circuit

TO: Counsel

SUBJECT: No. 86-3870 - Barbara and Christopher Schultz, etc. v. Metropolitan Life Ins. Co. and Hart Schaffner & Marx

After reviewing the briefs in this matter, the court had a few questions that at least one of the judges who will hear your argument knows in advance he would like to have answered or commented on in oral argument. Knowing that interruption of counsel to put these questions may interfere with counsel's train of thought, and desiring also to give counsel at least some opportunity to reflect on the questions, we are submitting them to you. We suggest that you try to answer them as directly as possible.

You are to answer these questions either orally at oral argument or by delivering an answer in writing (a handwritten copy will suffice) to the Clerk before oral argument and giving a copy to opposing counsel. You are not to file a post argument memo or brief unless specifically authorized to do so by the oral argument panel.

Of course, the fact that the court desires to know your answers to these questions must not be taken as an indication of the direction of the

court's thoughts or of the issues that the court considers decisive. Instead, they are part of the court's effort to understand the case as completely as possible.

You will likely be asked to answer other questions from members of the court as your argument proceeds. These, too, are designed merely to enable the court to understand your position. We hope that you will welcome the opportunity to give us as much information as possible.

The questions that we know at this time are the following:

Questions for both counsel:

1. What is the status of the administrative appeal?

2. Has prescription been tolled by the plaintiff's efforts to obtain administrative remedies? If so, how much of the prescriptive time period could have elasped?

3. Under Louisiana law, prescription is interrupted by the filing of suit or service of process, La. Civil Code Art. 3462, unless the plaintiff abandons, voluntarily dismisses, or fails to prosecute the suit, La. Civil Code Art. 3463. Do these provisions apply here?

4. If this court decides that administrative remedies must be exhausted, should we vacate the dismissal and grant a stay pending exhaustion?